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Rape in War: Challenging the Tradition of Impunity

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Reports of rape in the former Yugoslavia have brought much deserved and long overdue international attention to the issue of rape in war. This attention has highlighted the abusive character of wartime rape, but it also has revealed the persistent misunderstandings regarding rape's prevalence, function, and motivation in war. Moreover, efforts to ensure that rape is prosecuted effectively by the International Tribunal established to try war crimes committed in the former Yugoslavia have underscored the difficulties in applying international human rights and humanitarian law to rape.[1] In order to overcome these difficulties and to end the appalling history of impunity for this abuse, rape in conflict must be understood as an abuse that targets women for political and strategic reasons.

The Prevalence of Rape

Violence against women in conflict situations assumes many forms; rape is often only one of the ways in which women are targeted. But while other abuses, such as murder and other forms of torture have long been denounced as war crimes, rape has been downplayed as an unfortunate but inevitable side effect of sending men to war. It thus is ignored as a human rights abuse. Then when rape is reported and condemned, as it has been in Bosnia-Hercegovina, the abuses are called unprecedented and unique in their scale. In fact, wartime rape has never been limited to a certain era or to a particular part of the world.

During World War II, for example, Moroccan mercenary troops fought with Free French forces in Italy on terms that "included license to rape and plunder in enemy territory."[2] Nazis raped Jewish women despite soldiers' concerns with "race defilement" and raped countless women in their path as they invaded the Soviet Union.[3] The Soviets then exacted their revenge upon

German women as the troops battled their way to Berlin.[4]

More recent history provides further evidence of wartime rape. Pakistani soldiers fighting to suppress Bangladesh's independence, which was declared in 1971, terrorized the Bengali people with night raids during which women were raped in their villages or carted off to soldiers' barracks.[5] Similarly, Turkish troops participating in the 1974 invasion and occupation of Cyprus were notorious for the widespread rape of women and girls. In one instance, twenty-five girls who reported their rapes by Turkish soldiers to Turkish officers were then raped again by those officers.[6]

In Bosnia, countless women have been attacked and brutally raped. J., a thirty-nine-year-old Croatian woman, was detained in Omarska, a detention camp where Serbian forces tortured and summarily executed scores of Muslims and Croats. She recounted her rape by a reserve captain of the self-proclaimed "Serbian Republic." "He threw me on the floor, and someone else came into the room.... Both Grabovac and this other man started to beat me. They said I was an Ustasa and that I needed to give birth to a Serb—that I would then be different."[7]

In Peru, rape of women by security forces is common practice in the ongoing armed conflict between the Communist Party of Peru-Shining Path and government counterinsurgency forces. In 1992, Human Rights Watch documented more than forty cases of rape of women committed by soldiers during interrogation, in Peru's emergency zones, or in the course of security force sweeps and massacres.[8] In the violent struggle between Indian security forces and Muslim insurgents in the north India state of Jammu and Kashmir, Human Rights Watch recorded numerous rapes by Indian security and militant groups. In one case, members of an army unit searching a village for suspected militants gang-raped at least six women, including an eleven-year old girl and a sixty-year-old woman. One of these women was told by her rapist, "We have orders from our officers to rape you."[9]

Of all of the abuses committed in war, rape is inflicted in particular against women. Although men also are raped, efforts to document wartime rape reveal that women overwhelmingly are its most frequent targets. In Kenya, for example, of the 192 rapes of Somali refugees documented from February to March 1993, 187 involved women, four were against children, and one was against a man.[10]

Recently, efforts have been made to document and publicize such abuse. Although these efforts are crucial to enhancing accountability for wartime

rape, they often risk isolating sexual assault from other abuse occurring in conflict against either women or men. In fact, rape of women in war almost always occurs in connection with other forms of violence or abuse against women or their families. Women are raped as men are beaten or forced into hard labor. In Burma in 1992, government troops rounded up Rohingya Muslim men for forced labor, then returned to villages and raped the women left behind. When soldiers broke into sixteen-year-old Dilara Begum's house in the Arakan province in western Burma looking for the husband they had forced into hard labor, Dilara was gang-raped.[11] In December 1991, Jahura Khatu's husband was taken by government soldiers for forced labor from their home in the Arakan province. The soldiers returned repeatedly to the house and raped Jahura. In early 1992, soldiers forced Jahura at gunpoint to march with three other women to a nearby military camp where all four women were raped repeatedly for twenty-four hours.[12] Women who are raped are often also murdered or left to die by their attackers. ÒPancho," a Peruvian soldier who had served in the security forces, recalled one rape in 1982: "The boys played her like a yo-yo. Then we wasted her."[13] It is important to place rape in this context in order to understand that it functions, as do other wartime assaults, as a human rights abuse. Moreover, the harm inflicted by rape may be compounded by other concurrent violations against either the rape victim or those close to her.

Despite the pervasiveness of rape, it often has been a hidden element of war, a fact that is linked inextricably to its largely gender-specific character. The fact that the abuse is committed by men against women has contributed to its being narrowly portrayed as sexual or personal in nature, a portrayal that depoliticizes sexual abuse in conflict and results in its being ignored as a war crime. A more accurate understanding of the political function of wartime rape and the complexity of its motivation is necessary if adequate and responsive remedies are to be applied.

Rape's Function in War

Rape has long been mischaracterized and dismissed by military and political leaders—in other words, those in a position to stop it—as a private crime, a sexual act, the ignoble conduct of one occasional soldier, or, worse still, it has been accepted precisely because it is so commonplace. In Peru, for example, despite numerous reports of rape by soldiers, Peruvian military officers have dismissed such abuse as a "regrettable excess." Responding to reports of widespread rape of women refugees in camps in North Eastern

Kenya, the Kenyan government has denied that the rapes are occurring or has blamed the victims. One Kenyan official stated that the rape allegations were made solely to "attract sympathy and give the government negative publicity."[14] In April 1993, Radovan Karadzic, leader of the Bosnian Serbs, denied any knowledge of widespread rape in Serb-controlled Bosnia: "We know of some eighteen cases of rape altogether, but this was not organized but done by psychopaths."[15] Karadzic dismissed claims of mass rapes as the propaganda of "Muslim mullahs." When confronted with evidence of rape by government troops in Kashmir, Indian authorities try to impugn the integrity of witnesses, discredit the testimony of physicians, or just flaty deny the charges. A high-ranking army officer commented, "A soldier conducting an operation at the dead of night is unlikely to think of rape when he is not even certain if he will return alive,"[16] as if soldiers rape only when operating under safe conditions.

In fact, rape is neither incidental nor private. It routinely serves a strategic function in war and acts as an integral tool for achieving particular military objectives. In the former Yugoslavia, rape and other grave abuses committed by Serbian forces are intended to drive the non-Serbian population into flight. Serbian forces rid villages of the non-Serb population by first shelling towns, then segregating men from women and taking the men to detention centers. Women either are left to fend for themselves in towns controlled by enemy forces or are taken in groups to holding centers, where they may be raped, gang-raped, and beaten for days or even weeks at a time. B., a forty-year old Muslim woman, remained in her home with her husband when Serbian forces began shelling Doboj. Ground troops moved through the city, forced people from their houses and ordered the women and children onto buses. B. was taken to an abandoned high school where she was raped repeatedly for almost one month: "It began there as soon as I arrived. On [one] occasion I was raped with a gun ... Others stood watching. Some spat on us."[17]

In Burma, too, rape was a part of a campaign to drive the Rohingya out of the country. Eslam Khatun, wife of the village headman, was at home in the village of Imuddinpara with her children and sister-in-law, Layla, when soldiers forced open the door. The soldiers stripped Layla and began molesting her as they took her away. Eslam found Layla's body a week later; she appeared to have bled to death from her vagina. The next week, after the mutilated bodies of Eslam's husband and his brother were found, Eslam and her six children fled to a refugee camp, which then housed two-thirds of her village. Having driven more than 200,000 refugees into neighboring

Bangladesh, the Burmese government maintained that the Rohingyas were illegal immigrants from Bangladesh and never belonged in Burma in the first place."[18] These refugees, however, are no more welcome in Bangladesh. An October 1993 Human Rights Watch report details the abuse, including rape, of Burmese refugees by Bangladeshi military and paramilitary forces in charge of refugee camps.[19]

Documenting where and how rape functions as a tool of military strategy is essential to counteract the longstanding view of rape in war as private or incidental. The attention to rape's strategic function, however, has attached much significance to "mass rape" and "rape as genocide." This emphasis on rape's scale as what makes it an abuse demanding redress distorts the nature of rape in war by failing to reflect both the experience of individual women and the various functions of wartime rape.

Rape rises to the level of a war crime or a grave breach of the Geneva Conventions regardless of whether it occurs on a demonstrably massive scale or is associated with an overarching policy. Individual rapes that function as torture or cruel and inhuman treatment themselves constitute grave breaches of the Geneva Conventions.[20] Thus, even if rape occurs in an apparently indiscriminate fashion and not in the service of an overarching strategic policy and not on a massive scale, it constitutes a violation of international law. When rape does occur on a mass scale or as a matter of orchestrated policy, this added dimension of the crime is recognized by designating and prosecuting rape as a crime against humanity.[21]

Reports from Peru demonstrate the different ways in which rape, although not explicitly a matter of security force policy, functions as a tactical weapon. In Peru's Emergency Zones,[22] rape occurs in the course of armed conflict, usually in order to punish a group of civilians for perceived sympathies with armed insurgents, and to demonstrate the soldiers' domination over civilians.[23] In March 1992, Florencia lost her husband to a Shining Path execution squad and then was raped by the guerrillas. The army arrived in her village a week later and accused the villagers of collaborating with the guerrillas. Florencia was gang-raped by soldiers as the men of her village were beaten.[24] Rape during interrogation by Peru's counterinsurgency forces is committed in order to get information or frighten and intimidate an individual into complying with the wishes of her captors. Arrested and detained by Civil Guards for alleged guerilla activity, Flora Elisa Aliaga, twenty-nine years old and pregnant, was raped by eight of her captors, once with a machine gun.[25]

Although rape is a sex-specific type of abuse, it generally functions like other forms of torture to intimidate and punish individual women. In some instances, however, it also can serve a strikingly sex-specific function, when, for example, it is committed with the intent of impregnating its victims. A Bosnian rape victim told Human Rights Watch, "It was their aim to make a baby. They wanted to humiliate us. They would say directly, looking into your eyes, that they wanted to make a baby."[26] This function of rape has never been reflected in the remedies available for rape victims. If anything, pregnancy is viewed as the "inevitable byproduct of... rape," rather than as a distinct harm meriting its own remedy.[27]

In some documented instances of rape, the abuse appears to serve not only strategic or political functions but also the perverse sexual gratification of the attacker. Somali women refugees in Kenya typically are raped after being successfully robbed. Rape in this context is thus not only a tool for frightening refugees into complying with their attackers' demands, but also inflicted specifically against women for sex. The plights of "young" and "pretty" Burmese women kidnapped by soldiers and kept at army barracks for raping[28] and of the thousands of women pressed into service as "comfort women" during World War II further demonstrate that rape's function ostensibly may be not only to achieve overt political ends but also to satisfy the sexual proclivities of the attacker, just as rape should not be considered an exclusively sexual act, neither should it be viewed solely as a political tool divorced from the crime's sexual aspects. Doing so returns this debate to its starring point: the denial of any connection between the sexual element of rape and the political function that it serves.

Whenever committed by a state agent or an armed insurgent, whether a matter of policy or an individual incident of torture, wartime rape constitutes an abuse of power and a violation of international humanitarian law. The fact that rape functions, in most instances, as do other forms of torture or cruel and inhuman treatment makes it all the more striking that it has not been prosecuted like any other abuse. The differential treatment of rape underscores the fact that the problem—for the most part—lies not in the absence of adequate legal prohibitions, but in the international community's willingness to tolerate the subordination of women.

Motivation: Why Are Women Targeted?

Soldiers are motivated to rape precisely because rape serves the strategic interests delineated above. But the fact that it is predominantly men raping

women reveals that rape in war, like all rape, reflects a gender-based motivation, namely, the assertion by men of their power over women.[29] Men's domination of women is often deeply imbedded in societal attitudes, so much so that its role as a motivating factor is not easily discernible in every individual incident of rape. It is therefore difficult to distinguish the gender elements of a rapistÕs motivation from the specific political function served by the rape.

In human rights work, however, the assessment of motivation is crucial to determining the nature of the abuse and the remedy to be applied. Traditional human rights work has focused on politically-motivated abuse by states. Because gender-based abuse often was not considered to be political, it was not considered a human rights issue. Recognizing gender-specific abuse requires an understanding not only of the political character of the abuse but also of that element of motivation that is particularly related to gender.

Despite the difficulties of determining motivation, documentary efforts have revealed common elements in the motives of uniformed rapists. Soldiers rape to subjugate and inflict shame upon their victims, and, by extension, their victims' families and communities. Rape, wherever it occurs, is considered a profound offense against individual and community honor. This is true for Somali women, for example, who have been raped and must cope with not only the physical and psychological trauma of rape but also the likelihood of rejection by their families. In many cases, refugee families beg UN High Commissioner for Refugees (UNHCR) officials to take their daughters to another camp after they have been raped because the families feel such stigma. Other women, once raped, are ostracized by their husbands and isolated from their families.[30] Similarly, a commentator reported from the former Yugoslavia that "[o]ne woman told me that if she were raped, she would kill herself, even if her husband did not reject her. She could not stand the shame and humiliation, she could not face her children afterward."[31]

Soldiers can succeed in translating the attack upon an individual woman into an assault upon her community because of the emphasis placed—in every culture in the world—on women's sexual purity and the fact that societies define themselves, in overt or less clear-cut fashions, relative to their ability to protect and control that purity. It is the protection and control of women's purity that renders them perfect targets for abuse. In Turkey, an observer dismissed as impossible allegations of rape by Turkish government forces of Kurdish women—both civilians and guerrillas—on the basis that Turkish

soldiers understand that virginity and women's honor are sacred. Soldiers, it was argued, would not dare to defile women whose communities place a high social value on virginity and female modesty.[32]

In fact, soldiers do rape women precisely because the violation of their "protected" status has the effect of shaming them and their communities. Seventeen-year old S., a Kurdish woman from southeastern Turkey, was detained by village guards and Anti-Terror police during a night raid on her village, accused of harboring members of the Kurdish Workers' Party (PKK), raped during her interrogation, and taunted by her captors: "Now you're engaged, but after we rape you, no one will marry you." When she was released on a hillside in the middle of the night, S.'s captors warned her not to speak of the rape, "because it would be very bad for" her.[33]

S.'s story suggests that rapists may also be motivated by the likelihood that their victims will not report the assault. By virtue of being a rape victim, a woman becomes the perceived agent of her community's shame. In a bizarre twist, she changes from a victim into a guilty party, responsible for bringing dishonor upon her family or community. As a result, women victims, whether for fear of being seen this way, or because they see themselves this way, are extremely reluctant to report rape. The shame of rape may keep women, who would rather bury their "dishonor," from seeking punishment for their attackers. K.S., a fifty-four-year-old housewife who was raped in her home by Serbian soldiers, told Human Rights Watch, "What happened to me, happened to many, but the women keep it secret. It is shameful. Thus the mother conceals it if it happened to her daughter so she can marry and if it happened to an older woman, she wants to protect her marriage."[34] Only changes in women's protected status coupled with a better understanding of rape's function as a political or tactical abuse will help communities resist shaming and punishing the victim and put the responsibility on the attacker where it belongs.

While it is absolutely essential that efforts to achieve accountability tease out the "gender element" of rape's motivation, an overemphasis on gender alone, at least on a narrow conception of gender, can obscure other characteristics of a woman's identity that determine which women are raped. In Bosnia, a woman's religion or nationality, as well as her gender, makes her a target for rape. In Burma, government soldiers rape Rohingya women, thus identifying their victims by their sex and their ethnic affiliation. Rape by the security forces in Peru is strongly determined by race and class: rape victims are overwhelmingly poor and brown-skinned. And Somali women refugees

report that they are asked by their rapists to which clan they belong. Women who are the same clan as their attackers may still be robbed, but often are spared rape.[35]

The tendency to focus exclusively on the gender-motivational element of rape risks playing into an understanding of women's human rights abuse that is abstracted from the reality of different women's experiences. Women's experience of rape in war, like that of women's human rights abuse more generally, is always determined by a variety of factors, including race, class, religion, ethnicity, and nationality. Efforts to focus on gender alone, while understandable in the context of the historical disregard of gender as a motivating factor in human rights abuse, create a different problem, that of oversimplifying the ways in which different women experience human rights abuse. This not only obscures the diversity of women's experience, but also may hide the need to craft remedies that are responsive to gender and the many other factors that intersect with it.[36]

A Tradition of Impunity

The failure to punish rapists appears to be as consistent and widespread as rape itself. Only recently did the Japanese government officially admit to and apologize for forcing thousands of women into sexual slavery during World War II.[37] Even so, official statements have failed both to acknowledge the acts of the Japanese army as war crimes and to recognize the need for redress. This apology comes long after survivors—Korean, Chinese, Filipina and Indonesian women—came forward to tell their stories of being kidnapped, lured with false promises of employment, and shipped to various locations where they were forced to work as prostitutes.

Since World War II, there has been little improvement in acknowledging the gravity of rape as a wartime abuse, as demonstrated by the fact that it still goes largely unpunished. In October 1992, six Kashmiri women raped by Indian troops went to the hospital after their assaults, where doctors collected medical evidence of rape. The government inquiry of their allegations found the evidence unreliable and declared the charges "false" and an effort "to discredit the security forces."[38]

How is it that rape, a crime universally condemned, can be disregarded and trivialized when it occurs in war? Unfortunately, the answer is partly because

the attitudes toward women that prompt rape in the first place and that fuel its mischaracterization as "personal" are reinforced and even shared by those in a position to prohibit and punish the abuse. Thus, for example, when the International Commission of Jurists released its 1971 report on the fighting in East Pakistan, the Commission assumed that young girls and women kidnapped by Pakistani troops were held for the soldiers' sexual pleasure. The report failed to link widespread rape with the Pakistani army's stated goal of breaking the spirit of the Bengali people during the civil war.[39] When the European Commission of Human Rights heard evidence of rape by Turkish forces in Cyprus, it pronounced the abuse to be inhuman treatment but failed to examine its function as a form of torture.[40]

The mischaracterization of rape as a crime against honor, and not as a crime against the physical integrity of the victim, also has contributed to the failure to denounce and prosecute wartime rape. This misunderstanding of rape is reflected not only in attitudes but also in the laws themselves. In many countries and even in international law, rape is codified as a crime against honor rather than against the individual victim. In Brazil, rape is a "crime against custom." In Peru, until very recently, it was codified as a "crime against honor." Article 27 of the Fourth Geneva Convention prohibits "any attack of [women's] honor, in particular against rape, enforced prostitution, or any form of indecent assault." Thus, as a matter of law, rape is often perceived as harm against the community as symbolized by the woman's honor, and not as harm against the physical integrity of the victim herself. This characterization not only contributes to women being targeted for rape, but also reinforces their unwillingness to come forward and report it. Further, it establishes the victim as responsible for the loss of community honor rather than focusing on the attacker as responsible for the violation of the victim's physical integrity.

The Rhetoric of Rape

A comprehensive assessment of the obstacles to ensuring accountability for wartime rape must include an examination of the use of rape for rhetorical purposes. After the Germans invaded Belgium in August 1914, propaganda decrying the "rape of the Hun" was directed toward the United States to galvanize the country, then neutral, to come to the rescue of Belgium as symbolized by its ravaged women. Rhetoric decrying widespread rape appears to emphasize the gravity of the abuse. But, in fact, the use of rape to inflame conflict may impede efforts to obtain greater accountability for

rape in war. Today, in the former Yugoslavia, the parties to the conflict accuse each other of trumping up charges of mass rape to muster international sympathy and perhaps even military support. Rather than investigating allegations of rape and punishing attackers, political leaders accuse each other of sponsoring abuse and plead innocent to charges leveled against them.

When the horror of rape is invoked to serve political ends, women victims of rape are often ill-served by the attention they then receive. First, even if rape of women is condemned, the denunciation is intended not to ensure accountability but to exploit the problem. Women are victimized again, their assault manipulated for political ends. Rape survivors in the former Yugoslavia reportedly have attempted or committed suicide and have experienced severe clinical depressions and acute psychotic episodes after repeatedly recounting—sometimes in front of a television camera—the details of their assaults.[41]

Second, the individual crimes get lost in a sea of exaggeration, which, if not substantiated, may produce doubt about the scale of abuses and the credibility of women's individual testimonies. In early 1993, reports from Bosnia of mass rape claimed that anywhere from 10,000 to 60,000 predominantly Muslim women had been assaulted. These assertions were challenged by the Bosnian Serbs as impossible to prove and denounced as propaganda. A European Community investigative mission cited 20,000 rapes in a January 1993 report but the UN Commission of Experts has thus far been able to collect documentation of only about 3,000 rape cases and to identify only about 800 victims by name.[42] The number of rape cases that can be proved remains to be seen. The number of rapes that actually occurred probably will never be known. In any case, the use of numbers in the course of the conflict has served rhetorical rather than remedial purposes. This is underscored by the fact that the use of numbers by the parties to dramatize the victimization of "their women" is rarely accompanied by efforts by those same parties to prosecute alleged abusers. Thus women, perhaps twice victimized, receive no redress, and no precedent of accountability is established.

Accountability: Inadequate Protection or Enforcement?

International humanitarian law prohibits and provides the means to punish human rights abuses committed in war. Whether rape is included in these protections became a subject of debate recently when, in demanding a

response to reports of abuses in Bosnia, some urged that rape be designated specifically as a war crime. A December 1992 editorial in the New York Times, for example, implicitly endorsed a proposal to revise the Geneva Conventions to designate rape as a war crime.[43] Such exhortations gave the false impression that without such reform, no means of prosecuting rape exist under international law. On the contrary, the means for prosecuting rape as a war crime are firmly established in international law. The problem lies not in the law but in the failure to enforce its prohibitions.

International Law. Rape itself is explicitly prohibited under international humanitarian law governing both international and internal conflicts. The Fourth Geneva Convention of 1949 specifies in Article 27 that "[w]omen shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault."[44] Further, Article 147 of the same Convention designates "wilfully causing great suffering or serious injury to body or health," "torture," and "inhuman treatment" as war crimes and as grave breaches of the Conventions.[45] As the International Committee of the Red Cross (ICRC) has recognized, rape constitutes "willfully causing great suffering or serious injury to body or health" and thus should be treated as a grave breach of the Convention.[46] The ICRC also has stated that "inhuman treatment" should be interpreted in light of Article 27 and its specific prohibition against rape.[47] This interpretation was reinforced by the U.S. State Department in its recent statement that rape is a grave breach of the Geneva Conventions and should be prosecuted as such.[48] The Conventions specify that governments are obliged to find and punish those responsible for grave breaches and to make those accused available for trial.

As with international conflicts, humanitarian law clearly prohibits rape in internal conflicts. Rape committed or tolerated by any party to a non-international conflict is prohibited by Common Article 3 of the Geneva Conventions insofar as it constitutes "violence to life and person," "cruel treatment," "torture" or "outrages upon personal dignity.Ó[49] Moreover, Protocol II to the Geneva Conventions, which governs some internal conflicts, outlaws "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" committed by any party.[50] The ICRC explains that this provision "reaffirms and supplements common Article 3 ... [because] it became clear that it was necessary to strengthen ... the protection of women ... who may also be the victims of rape, enforced prostitution or indecent assault."[51]

Grave breaches of the Geneva Conventions attract universal jurisdiction[52] and therefore can be prosecuted by an international tribunal or by the domestic courts of any country. This mechanism for holding war criminals accountable, however, is available only for crimes committed in international conflicts. By contrast, the prohibitions against rape and other abuses committed in internal conflicts are not supported by effective means for international enforcement. Current humanitarian law provides little authority to the international community to compel a state to account for its conduct during an internal conflict.[53]

Nonetheless, rape committed in internal conflicts may, in theory, be prosecuted as crimes against humanity. Crimes against humanity may arise where crimes such as murder, enslavement, or other inhumane acts are committed on a mass scale and are directed at a civilian population.[54] The concept of crimes against humanity—unlike that of war crimes—allows for the prosecution of mass crimes committed by a state against its own nationals and thus provides a means for the international community to attack mass rape where it occurs in internal conflicts.[55] Rape was recognized as a crime against humanity in the aftermath of World War II[56] and again, in 1993, in the United Nation's statute for the international tribunal to try war crimes committed in the former Yugoslavia.

Customary international law demands that crimes against humanity be punished.[57] International consensus, however, currently recognizes that the duty and power to prosecute these crimes rests only with the state in whose borders the crimes are committed and not with an international tribunal nor with the domestic courts of any other country.[58] Absent an international treaty or a mechanism such as the Nuremburg Charter that specifically accords the power to prosecute crimes against humanity to an international court or that provides for universal jurisdiction, crimes against humanity must be prosecuted by the nation in which the abuses occurred.

The Torture Convention offers another possible remedy for victims of rape in internal conflicts by imposing a clear duty upon states to prosecute the acts deemed criminal by the Convention.[59] The obligation to prosecute torturers extends to all states that are party to the Convention, and thus constitutes a form of universal jurisdiction.[60] This remedy, however, has not yet been put effectively into practice. Thus, in most instances, the terms of enforcement of domestic law coupled with international pressure to prosecute rapists will give victims of wartime rape virtually their only opportunity for relief.

It is unfortunate that, in many countries, the domestic laws that would be

used to prosecute wartime rape classify the crime in ways that minimize its seriousness and introduce the possibility of discriminatory prosecution. As mentioned above, Peru's laws once designated rape a crime against honor; currently rape is defined as a crime against *libertad sexual* (the freedom to choose a sexual partner) and not as a physical assault. In many countries and some parts of the United States, there is no legal concept of marital rape.[61] Turkey's criminal code classifies rape as a "felony against public decency and family order" and not—as are other types of assault and battery—as a "felony against an individual." In Pakistan, evidentiary laws discriminate against women by granting no legal weight to their testimony in certain rape trials.[62] The inaccurate portrayal of rape in national laws worldwide reduces the likelihood that rape victims in internal conflicts will receive justice. Women often find that their honor, more than the rapists' actions, is on trial. Thus, in Peru, a nursing student who complained of attempted rape was asked by an assistant to the public prosecutor: "Are you a virgin? If you are not a virgin, why do you complain?"[63]

The War Crimes Tribunal. The international response to the atrocities in Bosnia presents a singular opportunity to enforce existing international law and begin to put an end to the history of impunity with regard to rape. In February 1993, the United Nations Security Council called for the establishment of an international tribunal to investigate and try perpetrators of war crimes on the Balkan conflict. The war crimes tribunal presents the only means of holding to account those who have attacked civilians and tortured detainees in flagrant violation of humanitarian law, and of achieving redress for the survivors of such abuse.

Women victims of war crimes, in particular, look to the tribunal to vindicate their right to equal protection under law through the prosecution of violence against women alongside other war crimes. By trying rape as torture, inhuman treatment, and the willful causing of "great suffering or serious injury to body or health,"[64] and not as an offense against honor, the tribunal will correct the mischaracterizations of rape that have trivialized the abuse in the past and resulted in women's attackers acting with impunity.[65]

The precedential value of the nascent tribunal is, however, at risk of being limited to rhetorical posturing by the United Nations.[66] Despite the importance of the tribunal it may go the way of many politically unpopular plans of action. The lack of financial and political support for the tribunal is demonstrated by UN foot-dragging chat slowed the process of setting the operations of the tribunal in motion, by the continuing failure to allocate

sufficient resources to the tribunal, and by the oft-repeated concern that amnesty may yet be traded for peace. This disregard for the tribunal has led many to doubt whether serious UN investigations of alleged war crimes will ever take place, let alone whether the tribunal will succeed in bringing war criminals to justice.[67]

Conclusion

Impunity for wartime rape must end. The international community's outrage in response to widespread rape in the former Yugoslavia must translate into a commitment to punish rape not only in that conflict, but also in any conflict where it occurs. The international war crimes tribunal must live up to its promise, prosecute rape, and reject the history of neglect of rape and sexual assault as crimes of war. National governments must hold those who commit rape in internal conflicts accountable and, where necessary, reform their national laws to reflect the substantive nature of the abuse.

The international community is responsible for ensuring that the war criminals that have destroyed so much of the former Yugoslavia are held to account. It also must take every possible step to ensure that no rapists in any conflict escape international condemnation and prosecution for their crimes.

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[1] The tribunal's formal ride is the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991.

[2] Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations (New York: Basic Books, Inc., 1977), 133.

[3] Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Bantam Books, 1975), 46-51.

[4] Ibid., 64-65.

[5] In March of 1971, the Bengal state-at that time officially East Pakistan-declared its independence as Bangladesh. West Pakistan imported troops to

put down the rebellion. Until India's armed intervention in December 1971, Pakistani troops waged war against the Bengalis. Estimates place the death toll at 3 million, the refugees into India at 10 million, the number of women raped at over 200,000 and their resultant pregnancies at 25,000.

Brownmiller, *Against Our Will*. 78-87.

[6] *Report of the Council of Europe on Human Rights in Cyprus,* 1974 (London: 1980), 121-22.

The Commission ruled that the cases of rape constituted "inhuman treatment."

[7] Helsinki Watch, *War Crimes in Bosnia-Hercegovina: Volume II* (New York-Human Rights Watch, 1993), 163-65.

[8] Women's Rights Project/Americas Watch, *Untold Terror: Violence Against Women in Peru's Armed Conflict* (New York: Human Rights Watch, 1992).

[9] Asia Watch, The Human Rights Crisis in Kashmir: A Pattern of Impunity (New York: Human Rights Watch, 1993), 103.

[10] Women's Rights Project/Africa Watch, *Seeking Refuge, Finding Terror: The Widespread Rape of Somali Women Refugees in North Eastern Kenya* (New York: Human Rights Watch, 1993), 2. Almost 300,000 refugees, most of them women and children, have fled the violence of war-torn Somalia since 1991 for refugee camps in North Eastern Kenya. For many of these women, rape played a role in inducing them to flee-the United Nations High Commissioner for Refugees recorded 85 cases of rape in Somalia between February and August 1992. Yet, instead of escaping the violence, Somali refugees encounter similar abuse in Kenya: UNHCR

has documented another 107 cases of rape in the Kenyan refugee camps.

[11] Asia Watch, Burma: Rape, Forced Labor, and Religious Persecution in Northern Arakan (New York: Human Rights Watch, 1992), 8.

[12] Ibid., 7.

[13] Women's Rights Project/Americas Watch, *Untold Terror*, 37.

[14] Women's Rights Project/Africa Watch, *Seeking Refuge*, 18.

[15] Roy Gunnan, "Rape Camps: Evidence in Bosnia Mass Attacks Points to Karadzic's Pals," *New York Newsday*, April 19, 1993, 7, 31.

[16] Dwarika Prasad Sharma, "Army to Safeguard Human Rights," Times of

India, January 6, 1993, quoted in Asia Watch, Rape in Kashmir. A Crime of War (New York: Human Rights Watch, 1993), 17.

[17] Helsinki Watch, War Crimes in Bosnia-Hercegovina, 216, 218.

[18] Asia Watch, *Burma*, 2.

[19] Asia Watch. *Bangladesh: Abuse of Burmese Refugees from Arakan* (New York: Human Rights Watch, 1993).

[20] Meron, *Rape as a Crime under International Humanitarian Law*, 87 Am.J.Ind L 424 426 (1993).

[21] Ibid., 427.

[22] Under state of emergency legislation, Peru's military is given control of a defined region, and acts as the ultimate authority over civilian elected and appointed officials. Certain rights, such as freedom of assembly and movement and the inviolability of the home, are suspended. Anyone living in a militarily controlled region, or "Emergency Zone," can be arrested without warrant and kept 15 days in incommunicado detention.

[23] Peru is an internal, not international, conflict. Although humanitarian law prohibits rape in both kinds of conflict, it distinguishes between internal and international war and provides lesser means of redress for rape and other abuses that occur in internal conflicts.

[24] Women's Rights Project/Americas Watch, *Untold Terror*, 39.

[25] Ibid., 29.

[26] Helsinki Watch, War Crimes in Bosnia-Hercegovina, 215.

[27] Anne Tierney Goldstein, *Recognizing Forced Impregnation as a War Crime Under*

International Law: A Special Report of the International Program (New York: The Center for Reproductive Law and Policy, 1993).

[28] UN. Commission on Human Rights, *Report on the Situation of Human Rights in Myanmar*, 49th Sess., at 16, E/CN.4/1993/37 (February 17, 1993).

[29] U.N. Division for the Advancement of Women, *Report of the Expert Group Meeting on Measures to Eradicate Violence Against Women* (New York; October 8,1993). [unedited version).

[30] Women's Rights Project/Africa Watch, *Seeking Refuge,* 15.

[31] Slavenka Drakulic, "Mass Rape in Bosnia: Women Hide Behind a Wall of Silence," *The Nation*, March 1, 1993,271.

[32] Interview by Human Rights Watch, Istanbul, Turkey, July 1993.

[33] Interview by Human Rights Watch, Diynrbakir, Turkey, July 15, 1993.

[34] Helsinki Watch, War Crimes in Bosnia-Hercegovina, 170.

[35] Women's Rights Project/Africa Watch, *Seeking Refuge*, 7.

[36] The problem of oversimplification of women's experience is discussed in Nesiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 Harv. Women's L.J. 189 (1993). Nesiah argues that privileging gender as the unifying element of the community of *all* women prevents other issues pertaining to class, nationality, race, ethnicity, or sexuality from being addressed and denies the political realities that may divide women as well as bring them together.

[37] Teresa Wacinabe, "Japan Admits that WWII Sex Slaves Were Coerced," *Los Angeles Times*, August 5, 1993, Al, Washington, D.C. edition.

[38] Asia Watch, The Human Rights Crisis in Kashmir, 106.

[39] International Commission of Jurists, *The Events in East Pakistan*, (1971) 41.

[40] Blatt. *Recognizing Rape as a Method of Torture*. 19 N.Y.U. Rev.L &. Soc. Change 821.843.

[41] Shana Swiss and Joan E. Giller, "Rape as a Crime of War: A Medical Perspective." *Journal of the American Medical Association*, vol. 270. no. 5 (1993): 612-15.

[42] Paul Lewis, "Rape Was Weapon of Serbs. U.N. Says: But Panel Adds Proven Cases May Be Below 20.000," *New York Times*, October 20, 1993.

[43] "Rape-and Soldiers' Morale," *New York Times*, December 7, 1992.

[44] Convention Relative Co the Protection of Civilian Persons in Time of War, August 12, 1949, 6 UST 3516, 75 UNTS 287 (Geneva Convention No. IV), Article 27.

[45] War crimes are violations of the laws of war that "are committed by persons 'belonging' to one party to the conflict against persons or property of the other side." Meron. *Rape as a Crime Under International Humanitarian Law*, 87 Am.J.Ind.L 424, 436 n. 19 (1993). Certain war crimes are designated

by the Geneva Conventions to be grave breaches.

[46] Meron, *Rape as a Crime*, 426, citing International Committee of the Red Cross, Aide-Memoire, December 3, 1992.

[47] Meron, *Rape as a Crime*, n.21, citing Commentary on the Geneva Conventions of the 12 August, 1949: *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Oscar M. Uhler & Henri Coursier, eds. (1958), 598.

[48] Meron, *Rape as a Crime*, 427.

[49] Rape constitutes torture (as defined by the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) when it is used to inflict severe pain or suffering in order to obtain information or confession, or for any reason based on discrimination, or to punish, coerce or intimidate, and is performed by state agents or with their acquiescence. See Blatt, *Recognising Rape as Method of Torture*, 19 N.Y.U. Rev.L & Soc. Change 821 (1993).

[50] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, Art. 4(2Xe), 1125 UNTS 609, 16 ILM 1442 (1977) (Protocol II).

[51] *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Yves Sandoz, Christophe Swinarski, Bruno Zimmerman, eds. (Geneva: Martinus Nijhoff Publishers, 1987), 1375, par. 4539.

[52] Universal jurisdiction exists where the law recognizes the competence of any court to try an alleged offender, without regard to territorial or other traditional bases of jurisdiction. U.S. law takes the position that: "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in (section) 402 is present." Restatement (Third) of Foreign Relations Law of the United States, Section 404 (1987).

[53] See Francoise Hampson, "Human Rights and Humanitarian Law in Internal Conflicts," in *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, Michael A- Meyer, ed. (London:

British Institute of International and Comparative Law, 1989), 55-80.

[54] Crimes against humanity also may occur in the course of international conflicts and were prosecuted alongside war crimes at Nuremberg.

[55] Helsinki Watch, *War Crimes in Bosnia-Hercegovina*, 394-97.

[56] Control Council Law No. 10, *Control Council for Germany*, Official Gazette, Jan. 31, 1946, at 50, reprinted in *Naval War College, Documents on Prisoners of War* 304 (*International Law Studies*, vol. 60, Howard S. Levie, ed. 1979). The Control Council defined crimes against humanity as "[a]trocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed against any civilian population...."

[57] Orendicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,* lOOY.L.J. 2537, 2594.

[58] Orentdicher, *Settling Accounts*, 2593.

[59] The Torture Convention obliges each State Parry to Òtake such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him ..." Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 5. Article 7 of the Convention specifies that States Parties must either extradite an alleged torturer or submit the case for prosecution in their own courts. See also Orendicher, *Settling Accounts*, 2566.

[60] Orendicher, *Settling Accounts*, 2567.

[61] Only in 1991 did the United Kingdom outlaw marital rape. See "Judges Nail 'Lie' That Husbands Cannot Rape," *Independent*, October 24, 1991, 3.

[62] Women's Rights Project/Asia Watch, *Double Jeopardy: Police Abuse of Women in Pakistan* (New York: Human Rights Watch, 1992).

[63] Women's Rights Project/Americas Watch, *Untold Terror*, 12-13.

[64] Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12,1949, 6 UST 3516, 75 UNTS 287, (Geneva Convention No. IV], Article 147.

[65] The Statute of the Tribunal does not specifically designate rape in its list of war crimes. It does, however, rely on the terms of the Geneva Conventions which have, as discussed, been interpreted to provide for the prosecution of

rape as a war crime. Further, the Statute includes rape as a crime against humanity "when committed in armed conflict, whether international or internal in character, and directed against any civilian population." *Report of the Secretary-General Pursuant to Para. 8 of Security Council Resolution 808*, UN. Doc. 5/25704 (1993). Article 5.

[66] In *Prosecute Now!* (August 1, 1993), Helsinki Watch urged the United Nations to move beyond mere discussion of setting up the tribunal to beginning its operations.

[67] See John Pomfret, "War Crimes' Punishment Seen Distant: Balkan Probe Lacks Funds and Backing," *Washington Post*, November 12, 1993.